No. 98-896

In The

Supreme Court of the United States

October Term, 1998

MARK ROTELLA,

Petitioner,

v.

ANGELA M. WOOD, M.D., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner brought this RICO claim in connection with his related suit for tort claims arising from medical treatment he received at a psychiatric hospital. The RICO suit raised the following question:

> Does a civil RICO claim accrue when the plaintiff discovers the injury – the "injury discovery" rule – or, should it accrue when the plaintiff discovers both the existence of the injury and that the injury is part of a pattern of racketeering activity – the "injury and pattern discovery" rule?

LIST OF PARTIES

The petition accurately lists the parties to the proceeding.

Respondent Dallas Psychiatric Associates was a general partnership composed of the following professional associations, among others: Larrie W. Arnold, M.D., P.A.; Bradford M. Goff, M.D., P.A.; Fred L. Griffin, M.D., P.A.; William M. Pederson, M.D., P.A.; Leslie H. Secrest, M.D., P.A.; John M. Zimburean, M.D., P.A.; Ronald Fleischman, M.D., P.A.; and David R. Baker, M.D., P.A. R. 3.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Angela M. Wood, M.D., and M.D., P.A.; Gary Lee Etter, M.D., and M.D., P.A.; William M. Pederson, M.D., and M.D., P.A.; Grover Lawlis, M.D., and M.D., P.A.; David R. Baker, M.D., and M.D., P.A.; Larrie W. Arnold, M.D., and M.D., P.A.; Fred L. Griffin, M.D., and M.D., P.A.; Leslie H. Secrest, M.D., and M.D., P.A.; John M. Zimburean, M.D., and M.D., P.A.; Bradford M. Goff, M.D., and M.D., P.A.; and Dallas Psychiatric Associates, (collectively referred to as the "Doctor Respondents"), respectfully request that this Court deny the petition for writ of certiorari because, as set forth below, the court of appeals correctly applied the majority "injury discovery" rule and because this is not an appropriate case to resolve the conflict among the circuit courts of appeal.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in the related tort suit, *Rotella v. Pederson*, is reported at 144 F.3d 892 (5th Cir. 1998), and reprinted at App. 1.

STATEMENT OF THE CASE

The Doctor Respondents are physicians and professional associations which had treating privileges at Brookhaven Psychiatric Pavilion ("Brookhaven") during Petitioner Rotella's sixteen month hospital stay there.

Rotella was discharged from Brookhaven on June 16, 1986, one month after his eighteenth birthday. At no time after that date were the Doctor Respondents in any way involved in Rotella's medical care or treatment. Eight years later, in April 1994, a former patient at Brookhaven contacted Rotella and urged him to sue the Doctor Respondents alleging that patients were hospitalized for economic rather than medical reasons. App. 3. In June 1994, Brookhaven's parent company, Psychiatric Institutes of America ("PIA"), pleaded guilty to charges of fraud and conspiracy. *Id.* None of the Doctor Respondents were charged with these violations.

Rotella filed two suits. The first suit, in November 1994, alleged state tort causes of action and civil rights violations for inappropriate treatment at Brookhaven (*"Rotella I"*). The trial court granted summary judgment on all claims based on limitations and the Fifth Circuit affirmed. *Rotella v. Pederson*, 144 F.3d 892, 898 (5th Cir. 1998). App. 1. The Court ruled that "Rotella knew what happened to him during his hospitalization, who was involved in his treatment and how it impacted him at the time of his release. Therefore, he was on notice of his injury on the date of his release, at the latest." *Id.* at 896. App. 10.

Rotella had attempted to add a RICO complaint to *Rotella I* in order to avoid the limitations bar, but the amendment was denied by the trial court. R. 91, 129. Therefore, Rotella filed the second suit (*"Rotella II"*) in July 1997, more than eleven years after being discharged from Brookhaven, alleging civil RICO violations stemming from his care at Brookhaven. R. 1.

The trial court granted summary judgment in favor of the Doctor Respondents in *Rotella II*, applying the RICO accrual rule used by the majority of the circuit courts of appeal, the "injury discovery" accrual rule. It held that Rotella's RICO claim was barred by the four-year statute of limitations. The Fifth Circuit affirmed, holding that a civil RICO claim accrues upon the discovery of the injury alone, not upon the discovery of both the injury and the pattern of racketeering activity. *See Rotella v. Wood*, 147 F.3d 438, 439-40 (5th Cir. 1998). Pet. App. 1.

REASONS FOR DENYING THE WRIT

While acknowledging that a conflict exists among the various discovery accrual rules applied by the circuit courts of appeal, this Court declined to resolve the question of when a civil RICO cause of action accrues because it was not outcome-determinative in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S.Ct. 1984 (1997). This Court should deny the petition for certiorari because the choice of accrual rule here would neither answer the complex issues raised in *Klehr* nor affect the ultimate decision in this case.

1. This case does not present the critical issues reserved for decision in *Klehr*.

Klehr described the legal questions involved with the choice of accrual rule as "subtle and difficult." *Id.* at 1992. But the facts of *Klehr* did not "force focused argument as to how the traditional Clayton Act 'injury' accrual rule, principles of equitable tolling, and doctrines of equitable

estoppel should interact in circumstances where the application of one, or another, of these different limitations doctrines would make a significant legal difference." *Id.* Therefore, the Court advised that it "will wait for a case that clearly presents these, or related issues, providing an opportunity for full argument, before we attempt to resolve them." *Id.* Like *Klehr*, this case does not afford the depth of analysis sought by this Court.

This Court has continued to wait for a case presenting complex accrual issues. It has repeatedly declined to decide when a RICO claim accrues, denying certiorari in at least seven cases which ostensibly presented the question of the RICO accrual rule.[1] *Detrick v. Panalpina, Inc.*, 108 F.3d 529 (4th Cir. 1997), *cert. denied sub. nom, Gold v. Panalpina*, 118 S.Ct. 52 (1997); *Grimmett v. Brown*, 75 F.3d 506 (9th Cir. 1996), *cert. dism'd as improvidently granted*, 519 U.S. 233 (1997); *Bingham v. Zolt*, 66 F.3d 553 (2d Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Bowling v. Founders Title*

[1] Within six weeks after *Klehr*, this Court again declined to exercise its jurisdiction, denying a petition raising the following question: "Does civil RICO cause of action accrue when plaintiff discovered or should have discovered injury he suffered resulting from one act of racketeering activity ['injury discovery' rule], or does it accrue after plaintiff can allege pattern of racketeering activity as well ['injury plus pattern discovery' rule]." Abstract, *Spain v. Haseotes*, 66 U.S.L.W. 3303 (1997) (discussing petition for certiorari in *Spain v. Haseotes*, No. 95-1530, 1997 WL 312173, at **1 (1st Cir. June 9, 1997), *cert. denied*, 118 S.Ct. 562 (1997)).

Co., 773 F.2d 1175 (11th Cir. 1985), *cert. denied sub. nom, Zoldessy v. Founders Title Co.*, 475 U.S. 1109 (1986). In each of these cases, the facts of alleged racketeering activity were far more developed than in the present case. This suit was dismissed on limitations grounds just over three months after it was filed. R. 280. Thus, the record is exceedingly slim.[2]

Moreover, this case does not present the depth of issues this Court desires to resolve in deciding the accrual rule. For example, at no time after June 16, 1986, were the Doctor Respondents in any way involved in Rotella's care or treatment. Thus, the "separate accrual rule," while an issue in *Grimmett v. Brown*, 75 F.3d 506 at 512-14, is not at all an issue in this case. Further, there is no question as to whether equitable tolling or equitable estoppel principles apply. The only issue here is whether a civil RICO claim accrues upon discovery of the injury alone or discovery of the injury and a pattern of racketeering. In short, this case does not "force focused argument" on the RICO accrual issues that this Court was seeking in *Klehr*.

2. Resolution of the accrual rule question would not affect the outcome in this case.

As in *Klehr*, a decision on the accrual rule would not be outcome-determinative here. First, this is not truly a RICO suit, but rather a summary judgment personal

[2] Rotella submitted as summary judgment evidence his two-and-a-half-page affidavit, primarily containing hearsay statements about his conversation with a friend who told him about PIA's plea. R. 184.

injury suit clothed in RICO language. The RICO complaint was merely a vehicle designed to avoid fatal limitations flaws in *Rotella I*, the tort suit. It is highly questionable whether a pattern of racketeering could even be established at trial for these Doctor Respondents. Instead, the primary basis of Rotella's complaint is inappropriate medical treatment. R. 1-36.

Additionally, the RICO statutes do not provide a remedy for Rotella because he asserts only personal injury damages. Although he alleges in conclusory fashion that the Doctor Respondents' conduct injured him in "her [sic] business or property in violation of 18 U.S.C. § 1961(1)(B)," R. 34, the only injuries Rotella allegedly suffered were personal injuries resulting from his confinement and treatment at Brookhaven. Rotella contends he was "deprived of basic human dignity and humiliated," "suffered additional punitive treatment," was forced to submit to "abusive actions," was "intimidated," and was under "duress." R. 11, 13, 14, 27. *See also Rotella v. Pederson*, 144 F.3d 892, 894 (5th Cir. 1998). App. 3-4. But these claims give rise to personal injury damages, not RICO damages.

In contrast, damages recoverable under RICO are limited to injury to a claimant's "business or property." 18 U.S.C. § 1964(c). Every circuit that has addressed whether personal injury damages are compensable under RICO has held that they are not. *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 n.20 (5th Cir. 1998); *Pilkington v. United Airlines*, 112 F.3d 1532, 1536 (11th Cir. 1997); *Bast v. Cohen, Dunn & Sinclair, P.C.*, 59 F.3d 492, 495 (4th Cir. 1995); *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783, 785-86 (9th Cir. 1992); *Genty v. Resolution Trust Corp.*,

937 F.2d 899, 918-19 (3d Cir. 1991); *Schiffels v. Kemper Finance Services, Inc.*, 978 F.2d 344, 353 (7th Cir. 1992); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986). This Court should therefore deny the petition for writ of certiorari because this case does not present the issues reserved for decision in *Klehr*, and the accrual issue is not outcome-determinative here.

MISSTATEMENTS IN THE PETITION

1. The petition does not correctly state the caption of this case as appropriate in this Court.

From the outset of this litigation, this case has been styled *"Mark Rotella vs. Angela M. Wood, M.D., et al."* This caption was used in the district court and in the Fifth Circuit. *See* Pet. App. 1, 6, 11. But upon filing his petition for writ of certiorari, Rotella inexplicably changed the caption to *"Mark Rotella v. Dallas Psychiatric Associates, et al."* Presumably he selected the partnership as the lead Respondent in order to make the case appear more like a RICO claim, and less like the case it truly is – a personal injury claim against a group of doctors.

It is impermissible for Rotella to "recaption" the case. Rule 34 of the Rules of the Supreme Court of the United States provides in pertinent part:

> Every document, whether prepared under Rule 33.1 or 33.2, shall comply with the following provisions:
>
> 1. Each document shall bear on its cover, in the order indicated, from the top of the page:

* * *

(d) the caption of the case as appropriate in this Court.

The appropriate caption here is the one used in the courts below, not the caption contrived by Rotella.

2. The petition does not accurately set forth the question presented to this Court.

Rotella presents the question as whether the RICO accrual rule choice should be between (i) "when the *injury alone happens*" or (ii) "when the plaintiff has both *suffered the injury* and discovered that it results from a pattern of racketeering activity." Pet. i (emphasis added). This is an incorrect statement of the conflicting accrual rules in this case. It posits a pure injury rule against an injury plus pattern discovery rule, making the contrast appear sharper than it is. Moreover, it misstates the holdings below. The trial court and the Fifth Circuit applied an injury discovery accrual rule in this case. *See Rotella v. Wood*, 147 F.3d 438, 440 (5th Cir. 1998), Pet. App. 5, 9.

3. The petition misrepresents Psychiatric Institutes of America's guilty plea.

Rotella represents that "Psychiatric Institutes of America, the owner of the hospital, had pleaded guilty to federal charges, including criminal RICO violations." Pet. 2. This statement is incorrect. There was no guilty plea to any criminal or civil RICO violations. Rather, eight years after Rotella's discharge from Brookhaven, Psychiatric Institutes of America ("PIA") and PIA's Texas Regional

Director, Peter Alexis, pleaded guilty to charges of fraud and conspiracy. *See Rotella v. Pederson*, 144 F.3d 892, 894 (5th Cir. 1998). App. 3.

CONCLUSION

Because this case does not present the issues reserved for decision in *Klehr*, and because decision of the RICO accrual rule would not be outcome-determinative here, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Mark ROTELLA, Plaintiff-Appellant,

v.

William M. PEDERSON, M.D., William M. Pederson, M.D.P.A., Leslie H. Secrest, M.D., Leslie H. Secrest, M.D.P.A., John M. Zimburean, M.D., John M. Zimburean, M.D.P.A., Larry W. Arnold, M.D., Larry W. Arnold, M.D.P.A., Bradford M. Goff, M.D., Bradford M. Goff, M.D.P.A., Fred L. Griffin, M.D., Fred L. Griffin, M.D.P.A. Angela M. Wood, M.D., Angela M. Wood, M.D.P.A., Gary Lee Etter, M.D., Gary Lee Etter, M.D.P.A., Grover Lawlis, M.D., Grover Lawlis, M.D.P.A., Dallas Psychiatric Associates, A Partnership, Defendants-Appellees.[1]

No. 97-10731.

United States Court of Appeals,
Fifth Circuit.

July 14, 1998.

Robert Franklin Andrews, Andrews & Cirkiel, Fort Worth, TX, Richard Phillips Hogan, Jr., Kevin Hampton Dubose, Holman, Hogan, Dubose & Townsend, Houston, TX, Martin J. Cirkiel, Round Rock, TX, for Plaintiff-Appellant.

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[1] Rotella's appeal from the district court order as to Defendants-Appellees Ronald Fleischmann, M.D. and Ronald Fleischmann, M.D.P.A. were dismissed with prejudice post-argument.

Tom B. Renfro, Joseph F. Cleveland, McLean & Sanders, Fort Worth, TX, for Pederson, Secrest, Zimburean, Arnold, Goff, Griffin and Dallas Psychiatric Associates, Defendants-Appellees.

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Charles T. Frazier, Jr., Andrea M. Kuntzman, Cowles & Thompson, Dallas, TX, for Lawlis.

Appeal from the United States District Court for the Northern District of Texas.

Before REAVLEY, DeMOSS and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Plaintiff-Appellant, Mark Rotella ("Rotella"), appeals from the district court's order granting summary judgment for defendants based on its finding that Rotella's claims were barred by limitations. We affirm.

FACTS AND PROCEEDINGS

On February 19, 1985, Rotella, then age sixteen, was admitted to Brookhaven Psychiatric Pavilion ("Brookhaven"). Defendants-appellees are physicians and professional associations which had treating privileges at Brookhaven during Rotella's hospital stay. Although Rotella was initially admitted involuntarily on the request of his mother and his prior therapist after a suicide threat, he signed for a voluntary admission rather than face an involuntary commitment proceeding. He

was discharged sixteen months later, on June 16, 1986, shortly after his eighteenth birthday. Rotella made several requests for release pursuant to Texas law. Each time he withdrew his request prior to the expiration of the 96 hour waiting period, except one occasion when he was advised that his application was not properly submitted and he would have to make another application. He characterizes the withdrawals of his requests for release as coerced.

In April of 1994, Wendy Edelman, another former patient at Brookhaven, contacted Rotella and urged him to file a lawsuit against the doctors who had treated them at Brookhaven because the doctors had based their decisions to keep patients hospitalized on economic rather than medical criteria.

In June 1994, Brookhaven's parent company, Psychiatric Institutes of America ("PIA"), and PIA's Texas Regional Director, Peter Alexis pleaded guilty to charges of fraud and conspiracy. The underlying fraud related to doctors extending the length of stay for patients in psychiatric hospitals beyond medical necessity in order to maximize health insurance benefit payments.

In July 1994, Defendants-Appellees filed suit in Texas state court against Rotella and his attorney alleging that Rotella slandered them by telling third parties that they "received a $10,000 bonus for each bed filled over the Christmas holidays." Rotella filed a counterclaim asserting civil rights violations and state law causes of action arising out of his treatment at Brookhaven in 1985-86. He alleged that in-patient treatment was generally inappropriate for his condition and that specific treatments,

such as the use of restraints and limitations on his movements and privacy, were inappropriate and abusive.

The state court granted summary judgment for defendants on Rotella's state claims, finding that they were barred by limitations and denied defendants' motions for summary judgment on the civil rights claims. Rotella's counterclaim was then severed and, on March 3, 1997, was removed to federal court.

On June 30, 1997 the district court denied Rotella's motion to reconsider summary judgment on the state law claims and, on reconsideration, granted summary judgment for defendants on the civil rights claims, finding that they were barred by limitations as well. Final judgment was entered for defendants and Rotella appealed.

After this case was briefed, the Texas Court of Appeals at Fort Worth handed down two opinions addressing limitations issues in the context of former psychiatric patients suing PIA and related doctors and entities. *See Savage v. Psychiatric Institute of Bedford, Inc.*, 965 S.W.2d 745 (Tex.App. – Fort Worth 1998, writ requested); *see also Slater v. National Medical Enterprises, Inc.*, 962 S.W.2d 228 (Tex.App. – Fort Worth 1998, writ requested). While neither opinion directly disposes of every issue before this court, both support the district court's determination that Rotella's claims are time barred.

ANALYSIS

Statute of limitations

We review the district court's grant of summary judgment on the basis of limitations *de novo*. *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1046 (5th Cir.1996).

Rotella does not dispute that his suit was filed more than four years after he was discharged from Brookhaven, but posits several theories for tolling the statutes of limitations. Rotella bears the burden of proof on each of his tolling theories. *See Weaver v. Witt*, 561 S.W.2d 792, 794, n. 2 (Tex.1977).

a. Are Rotella's Claims Health Care Liability Claims?

All health care liability claims must be brought within two years of "the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed." TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01 (Vernon Supp.1997). Rotella contends that his case is fundamentally one of fraud which is governed by a four year statute of limitations.

In *Shannon v. Law-Yone*, 950 S.W.2d 429 (Tex.App. – Fort Worth 1997, writ denied), the Fort Worth Court of Appeals considered this limitations question in a context that was nearly identical to this case. Shannon was a voluntary inpatient at Brookhaven for six weeks during 1989. Shannon brought suit in 1993 alleging that Brookhaven doctors and other employees fraudulently induced him to lengthen his stay and coerced him into waiving a release that he requested resulting in emotional

strain, trauma and anguish. The court held that Shannon's common law fraud claim is not a "health care liability claim" as defined by art. 4590i and it is therefore governed by the four-year fraud statute of limitations. *Id.* at 438. Making an *"Erie* guess"[2] as to how Texas courts would resolve this issue based on the intermediate Texas appellate court opinion in *Shannon*, we hold that the four-year statute of limitations applies to Rotella's fraud claims.

b. Counterclaims – § 16.069, Texas Civil Practice and Remedies Code

Rotella's claims were originally filed as counterclaims to a petition brought by defendants against him, his attorney and another former patient in state court. The original suit alleged that Rotella slandered defendants in 1994 by stating that the defendants "received a $10,000 bonus for each bed filled over the Christmas holiday." Under Texas law, an individual who has a counterclaim which is otherwise time-barred may file that counterclaim within thirty days of the date his answer is due, if the counterclaim "arises out of the same transaction or occurrence that is the basis of [the] action." § 16.069(a) TEX.CIV.PRAC. & REM.CODE ANN. (Vernon 1986). Rotella claims that there is a "critical link" between the alleged 1994 statement and his 1984-86 stay at Brookhaven because the slander suit alleged that Rotella had harbored ill will toward his doctors since his

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[2] *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Brookhaven treatment. He also argues that the counter claims "arose out of" the same occurrence because Rotella's lawyer was also named as a defendant in the slander suit and a reasonable juror could conclude that the slander suit was a preemptive strike to intimidate Rotella and his attorney and prevent them from filing suit against the defendants.

The district court rejected this argument, holding that Rotella's counterclaim did not arise from the same transaction and therefore could not be revived under § 16.069. Relying on *Hobbs Trailers v. J.T. Arnett Grain Co., Inc.*, 560 S.W.2d 85, 88-89 (Tex.1977) (addressing art. 5539c, the predecessor statute of § 16.069), the district court reasoned, "This conclusion is consistent with the purposes of the statute. 'The statute was intended to prevent a plaintiff from waiting until an adversary's valid claim arising from the same transaction was barred by limitation before asserting his own claim.' "

Appellees urge us to affirm the district court, arguing that Rotella's claims arose from his hospital stay, while the slander claim arose out of a statement made eight years later in a related but separate incident. Therefore, Appellees argue, § 16.069 does not control, because the counterclaims did not arise out of the same incident. In *Leasure v. Peat, Marwick, Mitchell & Co.*, 722 S.W.2d 37 (Tex.App. – Houston [1st Dist.] 1986, no writ), a Texas court held that Leasure's counterclaims based on an audit that Peat Marwick had performed in 1976-77 did not arise from the same transaction or occurrence as Peat Marwick's original claim for malicious prosecution which was based on Leasure's 1980 lawsuit. *Id.* at 38-39. The court emphasized that Peat Marwick's claim, while it had

some relationship to the 1976-77 audit that was the subject of the counterclaim, was based on Leasure's alleged wrongful conduct which occurred some three years later.

Rotella cites two cases to rebut the holding in *Leasure*, neither of which convince us that the district court's reliance on *Leasure* was misplaced. *Fluor Engineers and Constructors, Inc. v. Southern Pacific Transp. Co.*, 753 F.2d 444, 449 (5th Cir.1985), summarily states, without analysis, that the claims in question arose out of the same transaction. *Barraza v. Koliba*, 933 S.W.2d 164, 168 (Tex.App. – San Antonio 1996, writ denied), held that a suit seeking to construe a title conveyance document and a counterclaim alleging that one party misrepresented what was being conveyed by that document arose from the same transaction. We agree with the district courts' conclusion that Rotella's claims and the state court slander claims arose from two separate incidents.

Finally, the preemptive strike argument is meritless. Either the claims were already time-barred and there was nothing left to preemptively strike or they are not time-barred and they do not need § 16.069 for revival.

We therefore hold that § 16.069 does not operate to revive Rotella's time-barred counterclaims.

c. The Discovery Rule

Art. 4590i indicates that its limitations provisions apply regardless of any other law or legal disability. The Texas Supreme Court nonetheless held the statute unconstitutional to the extent that it cuts off a party's ability to bring suit before having a chance to discover the injury.

Consequently, a party must have a reasonable opportunity to discover an injury and bring suit within a reasonable time after the party knows, or reasonably should have known of an injury. *See Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex.1985).

Rotella contends that he did not discover his injury until April of 1994 when he spoke to Wendy Edelman, and that it was not reasonably possible for him to have discovered it prior to that date. He reasons that the emotional disorders that resulted from the defendants' wrongful acts were impossible for him to detect on his own and affected his ability to understand and pursue his remedies.

A party is deemed to be aware of an injury and its cause when a reasonable person, under the same circumstances, exercising reasonable diligence, would be aware of it. *See Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d 713, 717 (7th Cir.1994). Section 16.001, Tex. Civ. Prac. & Rem.Code, provides that a person of unsound mind is under a legal disability and that "[i]f a person entitled to bring an action is under a legal disability when the cause of action accrues, the time of the disability is not included in the limitations period." The district court found that there was no summary judgment evidence in the record to support a finding that Rotella lacked the requisite mental capacity when he was discharged in June of 1986. Rotella does not specifically assert that he qualifies for unsound mind tolling pursuant to § 16.001. Rather, he contends that he has created a fact question on whether he knew or should have known of his injury earlier.

Rotella knew what happened during his hospitalization, who was involved in his treatment and how it impacted him at time of his release. Therefore, he was on notice of his injury on the date of his release, at the latest. *See Slater v. National Medical Enterprises, Inc.*, 962 S.W.2d 228, 233 (Tex.App. – Fort Worth 1998, writ requested). Rotella's argument relies on his mental illness to excuse his late filing, while not specifically evoking or establishing the elements of tolling based on an unsound mind theory. Without resort to a mental incapacity argument under § 16.001, his discovery argument fails.

d. Fraudulent concealment

Under Texas fraudulent concealment law, a defendant must be charged with a legal duty through a special relationship to reveal the concealed facts to the plaintiff before he can claim tolling under this theory. *See Dougherty v. Gifford*, 826 S.W.2d 668 (Tex.App. – Texarkana 1992, no writ). The duty to disclose in medical contexts ends when the physician-patient relationship ends. *See Thames v. Dennison*, 821 S.W.2d 380, 384 (Tex.App. – Austin 1991, writ denied). Rotella does not dispute that his relationship with defendants ended on June 16, 1986 when he was discharged from Brookhaven. Under *Thames*, his fraudulent concealment theory does not save his causes of action from the limitations bar.

However, Rotella argues that *Thames*, an intermediate Texas appeals court decision, cannot serve as the basis of this court's decision because it relies on language from the dissent in *Borderlon v. Peck*, 661 S.W.2d 907 (Tex.1983), and is inconsistent with the Texas Supreme Court's

majority opinion in that case. We disagree with Rotella's reading of *Borderlon*. In fact, the *Borderlon* majority opinion holds only that art. 4590i did not abolish fraudulent concealment as a defense to limitations in medical malpractice actions. *Id.* at 908. It recognizes that a claim of fraudulent concealment must be based solely on the physician-patient relationship. *Id.* The *Borderlon* majority states, "The estoppel effect of fraudulent concealment ends when a party learns of facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which if pursued, would lead to discovery of the concealed cause of action." *Id.* at 908. Rather than focusing on the end of the patient-doctor relationship, the majority focused on the fact that the patient/plaintiff had information that put her on inquiry just four days after the end of that relationship and still outside the limitations period. We do not read the *Borderlon* majority as inconsistent with the *Borderlon* dissent regarding the effect of the termination of the doctor/patient relationship. Neither is *Borderlon's* holding inconsistent with *Thames* on this issue.

Finally, Rotella's reliance on *Gatling v. Perna*, 788 S.W.2d 44 (Tex.App. – Dallas 1990, writ denied), is misplaced. That opinion states that it could not, as a matter of law, fault a psychologically disturbed patient for relying on an opinion expressed by a psychiatrist, under whose regular care she had been for four years, to the exclusion of a physician she had consulted on only one occasion. 788 S.W.2d at 47. However, Gatling continued under her long-term psychiatrist's care through the time she rejected the other doctor's warning. Therefore, the holding in *Gatling* does not inform the question of the

effect of the termination of the doctor/patient relationship.

After the duty to disclose ended at Rotella's discharge, the limitations period began to run as soon as the injury was discovered or when it might have been discovered by the exercise of reasonable diligence. *See Slater v. National Medical Enterprises, Inc.*, 962 S.W.2d 228, 233 (Tex.App. – Fort Worth, 1998, writ requested). Because the discovery rule does not extend the limitations period beyond the end of Rotella's hospital stay, the argument for fraudulent concealment tolling fails as well.

e. Rotella's claims under 42 U.S.C. § 1983.

There is no federal statute of limitations for civil rights actions brought pursuant to § 1983. Consequently, courts construing § 1983 "borrow" the forum state's general personal injury limitations period. *See Owens v. Okure*, 488 U.S. 235, 249-50, 109 S.Ct. 573, 581-82, 102 L.Ed.2d 594 (1989). Because the Texas statute of limitations is borrowed in § 1983 cases, Texas' equitable tolling principles also control. *See Board of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 485, 100 S.Ct. 1790, 1795, 64 L.Ed.2d 440 (1980). Therefore our conclusions relative to Rotella's state tolling claims control this question as well.

Rotella argues that Texas fraudulent concealment doctrine is inconsistent with the federal fraudulent concealment doctrine because the federal doctrine does not hold that the duty to disclose in a medical context ends when the physician/patient relationship ends. First, no

authority supports this contention. At most, federal law is silent on this point. Second, such inconsistency is irrelevant. Although a state's tolling provisions cannot be inconsistent with the policies underlying § 1983, there is no authority for the proposition that it must be consistent with the federal tolling provisions. *See Rubin v. O'Koren*, 644 F.2d 1023, 1025 (5th Cir.1981). Rotella makes no argument, and we see no basis for holding, that the Texas tolling laws are inconsistent with policies underlying § 1983. Therefore, we conclude that the district court correctly dismissed the federal claims because they are likewise barred by limitations.

CONCLUSION

Based on the foregoing, we affirm the district court's dismissal because Rotella's claims are barred by the applicable statutes of limitations.

AFFIRMED.